

**BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA**

**IN THE MATTER OF APPLICATION FOR
BENEFICIAL WATER USE PERMIT NO.
41K 30022398 BY JAMES L HADLEY**

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FINAL ORDER

BACKGROUND

The Proposal for Decision (PFD) in this matter was entered on February 6, 2008. Applicant James L. Hadley filed timely exceptions to the PFD on February 25, 2008. Exceptions were also filed by objector Mark E. Lee on February 25, 2008. A request for oral argument was made by Applicant in his filing of exceptions. Oral argument was scheduled and heard telephonically on April 17, 2008, at which James L. Hadley and Mark E. Lee appeared and provided argument.

The PFD recommends denial of Permit Application No. 41K 30022398 because the Hearing Examiner found that the Applicant did not prove by a preponderance of the evidence “that water is physically available at the proposed point of diversion in the amount Applicant seeks to appropriate” § 85-2-311(1)(a)(i), MCA; “that water can reasonably be considered legally available during the period which the Applicant seeks to appropriate in the amount requested” § 85-2-311(1)(a)(ii), MCA; “that the water rights of prior appropriators under existing water rights, certificates, permits, or state water reservations will not be adversely affected” § 85-2-311(1)(b), MCA; and “that the proposed means of diversion, construction, and operation of the appropriation works are adequate” § 85-2-311(1)(c), MCA. The PFD found that the other criteria under § 85-2-311, MCA were met. §§ 85-2-311(1)(d) and)e), MCA.

The Applicant seeks to appropriate up to 92.9 acre-feet of water per year from Spring Coulee Creek. The water is proposed to be diverted by a dam into a 62.4 acre-foot on-stream reservoir located in the E½ NW¼SE¼ of Section 13, Township 22 North, Range 2 West, Teton

County, Montana. The proposed period of diversion is January 1 to December 31 inclusive. The proposed uses include: (1) Irrigation at 336.6 gpm from a secondary point of diversion (pump) up to 48.0 acre-feet and a period of use from April 15 to October 15 inclusive, and (2) livestock drinking directly from the reservoir up to 44.9 acre-feet (including 43.2 acre-feet of evaporation), with a period of use from January 1 to December 31 inclusive. The proposed place of irrigation use is 20 acres in the S½NE¼SW¼, and the place of stock use is the NW¼SE¼ and the NE¼SW¼, all in Section 13, Township 22 North, Range 2 West, Teton County, Montana.

STANDARD OF REVIEW

Pursuant to Mont. Code Ann. § 2-4-621, the Department may, in its final order:

reject or modify the conclusions of law and interpretation of administrative rules in the proposal for decision but may not reject or modify the findings of fact unless the agency first determines from a review of the complete record and states with particularity in the order that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.

"Substantial evidence" is evidence that a reasonable mind might accept as adequate to support a conclusion; it consists of more than a mere scintilla of evidence, but may be less than a preponderance. *Strom v. Logan*, 304 Mont. 176, 18 P.3d 1024 (2001). Furthermore, only factual information or evidence that is a part of the contested case hearing record shall be considered in the final decision making process. ARM 36.12.229(2). The record was closed at the end of the hearing. No evidence presented after the record was closed has been considered in this decision.

Pursuant to ARM 36.12.229, exceptions must specifically set forth the precise portions of the proposed decision to which the exception is taken, the reason for the exception, authorities upon which the party relies, and specific citations to the transcript if one was prepared. Vague assertions as to what the record shows or does not show without citation to the precise portion of the record (e.g., to exhibits or to specific testimony) will be accorded little attention.

I have considered the exceptions and reviewed the record under these standards.

APPLICANT EXCEPTIONS

While not specifically identified in the Applicants exceptions, it appears that all of the exceptions are limited to the Finding of Fact portion of the PFD.

Physical Availability

Finding of Fact No. 9. This Finding states “[t]his Application has a period of diversion stated as January 1 to December 31. The Applicant failed to provide any information that supports physical availability outside of May through September.” Applicant responds that “irrigation use will be from April 15 to October 15 as shown in the application and subsequent correspondence with the Havre office dated October 6, 2006” ; that “[t]here is no measured flow data for the winter months...”; that ARM 36.12.113(5) states that no flow rate is required for on-stream reservoirs unless requested; and that “[t]he drain ditches and natural springs . . . always supply sufficient water for the livestock . . . during the winter.”

Response: Applicant does not direct this reviewer to any portion of the record establishing an amount of water available during the non-irrigation season nor can this reviewer find such from a review of the record. Applicant misunderstands the purpose of ARM 36.12.113(5). This rule simply means that the flow rate for appropriation need not be identified, i.e. on-stream flow rate is that of the source. The Applicant must still demonstrate that there is water in the source. §§85-2-311(1)(a)(i), MCA. Finding of Fact No. 9 will not be rejected or modified.

Finding of Fact No. 10. This Finding states “[t]he Applicant did not provide any measurement information from a site above the proposed reservoir or at the proposed point of diversion. All data is from measuring stations below the proposed reservoir.” Applicant responds by asserting that the measuring station known as Upper Spring Coulee is located upstream of the proposed diversion.

Response: Applicant does not direct this reviewer to any portion of the record other than by reiterating that the location of the Upper Spring Coulee measuring station is located upstream of the proposed diversion where 8th Lane NE crosses the stream. A review of the record shows that 8th Lane NE does indeed cross a stream upstream of the proposed reservoir. However, this reviewer cannot find in the record a comprehensive map that delineates all of the various aspects of this proposed project or the locations of diversions and/or measuring

stations. Finding of Fact No. 8 (to which no exception was taken) states that the proposed reservoir is located just above the Upper Spring Coulee Creek measuring site. This reviewer cannot find that the Hearing Examiners Finding of Fact No. 10 was not based on competent substantial evidence. Finding of Fact No. 10 will not be rejected or modified.

Finding of Fact No. 11. This Finding simply states “[t]he Applicant did not provide adequate information to show how he calculated the acre-feet provided in the application.” Applicant responds with “[i]t is not clear from this comment which specific acre-feet data in the application was deemed unclear” and proceeds to explain how various calculations were made.

Response: Applicant does not direct this reviewer to any specific portion of the record to support this exception. This reviewer notes that Finding of Fact No. 11 (as with Finding of Fact Nos. 9 and 10) does not cite anything in the record as the basis for this Finding. While Finding of Fact Nos. 9 and 10 could be evaluated by looking at the record, this reviewer finds that Finding of Fact No. 11 is too vague to evaluate. Finding of Fact No. 11 is rejected and will be stricken.

Finding of Fact No. 12. Finding of Fact No. 12 is a Finding that Objector Lee is concerned about the location of the Applicant’s measurements and the high fluctuations in flow and reiterates some of Objector Lee’s evidence. Applicant responds by stating that the high fluctuations in flow are causing the erosion that the proposed reservoir would ameliorate by leveling out the flows. Applicant also responds that his measurements are in compliance with ARM 36.12.1702(2) and that the Upper Spring Coulee data is the appropriate data to use.

Response: Applicant does not direct this reviewer to any specific portion of the record to support this exception. Finding of Fact No. 12 simply summarizes Objector Lee’s concerns and evidence. Applicant does not direct this reviewer to any portion of the record to justify rejecting or modifying Finding of Fact No. 12. Applicant does not provide any explanation as to how this asserted information will affect evaluation of the relevant permit criteria. Finding of Fact No. 12 will not be rejected or modified.

Finding of Fact No. 13. This Finding states “[i] find the Applicant has failed to provide sufficient data to show that water is physically available in the amount requested for the period requested.” Applicant responds by pointing to the flows referenced in Finding of Fact No. 8 (which was not excepted to) measured during the irrigation season.

Response: Finding of Fact No. 13 is really a summarization of the preceding Findings of Fact in which the Hearing Examiner found that flows *outside* the irrigation had not been established as being physically available. Applicant's reliance on the proven irrigation season flows from Finding of Fact No. 8 are unavailing. The information in Finding of Fact 8 does not support water availability outside of the irrigation season. Finding of Fact No. 13 will not be rejected or modified.

Legal Availability

Finding of Fact No. 14. This Finding summarizes the Applicant's estimated flow rates required for the instant application and the other water rights on Spring Coulee Creek to its confluence with Muddy Creek. The total demand including the instant application would be about 6.7138 cfs and the Applicant stated that the demand would be easily met by the flows measured by the Applicant. Applicant's exception states simply that the total existing water rights on Spring Coulee Creek amount to 5.9015 cfs, that with the Applicant's proposed uses the demand would be 6.7138 cfs, and that the flows measured by the Applicant far exceed those demands.

Response: Applicant does not direct this reviewer to any specific portion of the record to support this exception. This reviewer finds that Finding of Fact No. 14 and the Applicant's exception thereto are in perfect alignment. This reviewer cannot discern from Applicant's exception the reason for the exception as required by ARM 36.12.229. While Applicant's exception addresses rights on Spring Coulee Creek, it does not address water rights for those source into which Spring Coulee Creek flows, which is the issue identified in Finding of Fact No. 14. Finding of Fact No. 14 will not be rejected or modified.

Finding of Fact No. 15. This Finding states that Spring Coulee Creek is a tributary to Muddy Creek and that the proposed reservoir lies approximately 6 miles above the confluence of Spring Coulee Creek and Muddy Creek. The Finding states that the Applicant failed to identify any rights below Spring Coulee Creek and did not provide a comparison of physical availability of water with the legal demands with respect to any such rights. Applicant responds by stating that the application lists water right holders on Muddy Creek but "it can't be determined from this list which of these rights are downstream of the confluence with Spring Coulee Creek. Applicant continues by stating that if all of the rights [listed in the application on

Muddy Creek] are considered they total 83.1 cfs and that the flows available at Vaughn (located downstream from the project on Muddy Creek 1.1 miles above its confluence with the Sun River) were 221 cfs during the irrigation season between the period from 1925 to 2005.

Response: Applicant misses the Hearing Examiner's point. The Hearing Examiner was looking for an analysis of *all* the water rights that could be implicated by the instant application. The Hearing Examiner saw that there were downstream rights on Muddy Creek below the confluence of Spring Coulee Creek, but the Hearing Examiner did not see any analysis of how the instant application could be deemed legally available in light of those rights. Finding of Fact No. 15 will not be rejected or modified.

Adverse Effect

Finding of Fact No. 16. This Finding states that Applicant's plan includes using a controllable headgate to mitigate adverse affects, to monitor flows in Muddy Creek, and coordinate between all water users in the area. The Finding continues that the Applicant testified that without careful coordination U.S. Fish and Wildlife water rights could be impacted. The Finding also includes the statement "[t]he Applicant did not provide an analysis of flow prior to May or after September. The Applicant also failed to provide a specific plan as to how to address the coordination of water users or impacts to the U.S. FWS water rights."

Applicant responds by stating that he will not irrigate prior to the turn on of the Greenfield Irrigation District's water, that when sufficient flow exists at the Vaughn gauge he will conduct a physical check of lower Spring Coulee, that since the FWP rights are upstream of the confluence of Spring Coulee Creek and Muddy Creek and thus will not be impacted by the proposed project, and that the record shows flows prior to May and after September for Muddy Creek.

Response: Applicant does not direct this reviewer to any specific portion of the record to support this exception other than a reference to "attachment 8a in the Application" [which refers to the pre-May, post-September Muddy Creek flows]. The exception does not respond with any specificity to the heart of Finding of Fact No. 16, which is that the Hearing Examiner did not find an *analysis* of the pre-May, post-September flow or a specific plan to address how any proposed coordination would be accomplished. Finding of Fact No. 16 will not be rejected or modified.

Adequacy of Appropriation Works

Finding of Fact No. 18. This Finding states “[a]pplicant designed the proposed reservoir using a design from the United State Department of Agriculture’s (USDA) website and stated the design was approved in writing by the Army Corp [sic] of Engineers. There is no evidence in the file that indicates the design was approved by the Army Corp [sic] of Engineers, or that a licensed design engineer was involved with the planning or design of the proposed dam and outlet structure.” The Finding continues that “[a]ccording to the Applicant, GID will do all dam construction, but there is no evidence to support that a licensed contractor will complete or oversee the construction.” The Finding concludes with a statement that DNRC engineer Marv Cross reviewed the dam design and state that it is a standard design and appears adequate but thought that more information regarding the plan would have been helpful. Applicant responds by stating that the design of the dam was not approved by the Army Corps of Engineers and that “a letter dated May 22, 2006 was received from the Army Corps of Engineers which stated that no Department of the Army authorization is required for this project.” Applicant also cites a letter dated June 21, 2006 from Marv Cross stating that the dam would not be a high hazard dam and asserts that there was “no indication in Mr. Cross’s letter that he thought more information would be helpful. Applicant asserts that Montana’s Dam Safety Act only requires involvement of a professional engineer if the dam is a high hazard dam, and there is no regulatory requirement for a licensed contractor.

Response: Applicant is correct in that no authorization or written approval is required from the Army Corps of Engineers (May 22, 2006, letter) and that the proposed dam is not a high hazard classification dam (June 21, 2006, letter). The record reveals that the Department determined that the proposed means of diversion, construction, and operation of the appropriation works are adequate (Application Review Form Dated February 9, 2007). The Department’s Engineer, Marv Cross, also opined that the design appears to be adequate and this reviewer cannot find in the record an opinion for Mr. Cross that he “thought more information would have been helpful. This reviewer finds that Finding of Fact No. 18, as written, does not conform to the standard of competent substantial evidence. Finding of Fact No. 18 is rejected and will be replaced with the following:

18. Applicant designed the proposed reservoir using a design from the United States Department of Agriculture’s (USDA) website. The proposed diversion works and reservoir design were evaluated by a DNRC engineer and other Department staff and

were deemed adequate. The Applicant has proven that the appropriation works are adequate. (Department file)

OBJECTOR LEE EXCEPTIONS

Objector Lee makes three general exceptions to the PFD. This reviewer notes that ARM 36.12.229 states that “[a]ny party adversely affect by the hearing examiner’s proposal for decision may file exception.” In the instant matter Objector Lee is not adversely affected by the PFD because the proposed order is to **DENY** the application and this Final Order upholds that denial, *infra*.. Objector Lee’s exceptions could be deemed moot. However, Objector Lee raises the possibility that some of the criteria that were found to be met in the PFD could, in the future, be used a precedent. I therefore address Objector Lee’s exceptions under the same standard as for other exceptions.

“The proposal for decision as written violates the letter and intent of the Upper Missouri Basin closure law 85-2-343 MCA.” Objector Lee questions, with out citation the record or authority, what evidence exists “that this most basic requirement of the law have been met.”

Response: Objector Lee cites no authority, nor does he make any specific reference to the record. Objector Lee simply appears to disagree with the Hearing Examiner’s finding that the proposed use meets the exception to the Upper Missouri River Basin Closure Law. “Vague assertions as to what the record shows or does not show without citation to the precise portion of the record . . . will be accorded little attention. ARM 36.12.229. This reviewer cannot conclude that the Hearing Examiner’s finding was in error.

“Proposal for Decision Findings of Fact and Conclusions: Apparent Contradictions” Objector Lee quotes from the PFD “[t]he application has shown that the proposed storage reservoir would not cause increased water temperatures in the stream below. The change in outlet design will bring cooler water from the bottom of the proposed reservoir into the creek below. I find the applicant has adequately shown that the water quality of a prior appropriator would not be adversely affected.” Objector Lee then extensively argues and points to portions of the record that show that water temperatures in Spring Coulee Creek may rise.

Response: While there is evidence in the record that there may be an increase in the temperature of Spring Coulee Creek, Objector Lee’s exception does address, and does not cite

any authority or specific portion of the record, that relates that potential rise in temperature to an adverse affect on a prior appropriator or adversely affects the water quality of downstream water right holders. This reviewer cannot conclude from the record that the Hearing Examiner's finding was in error.

“Non-compliance with the Beneficial Use Criteria 85-2-311 MCA” Objector Lee acknowledges that Irrigation and Stock water are beneficial uses. The exception relates to the need for a pond to effectuate those uses.

Response: Again, Objector Lee argues his opinion regarding how the proposed beneficial use should be accomplished without citing any authority or providing any specific citation to the record. “Vague assertions as to what the record shows or does not show without citation to the precise portion of the record . . . will be accorded little attention. ARM 36.12.229. This reviewer cannot conclude that the Hearing Examiner's finding was in error.

WHEREFORE this Final Decision Maker enters the following:

ORDER

The Proposal for Decision entered in this matter on February 6, 2008 is hereby adopted in its entirety with the following changes:

1. Finding of Fact No. 11 in the Proposal for Decision is stricken.
2. Finding of Fact No. 18 is replaced in its entirety by the following:
 18. Applicant designed the proposed reservoir using a design from the United States Department of Agriculture's (USDA) website. The proposed diversion works and reservoir design were evaluated by a DNRC engineer and other Department staff and were deemed adequate. The Applicant has proven that the appropriation works are adequate. (Department file)
3. Because Finding of Fact No. 18 was the only Finding of Fact related to the adequacy of the means of diversion, Conclusion of Law No. 8 is replaced in its entirety by the following:
 8. The Applicant has proven that the proposed means of diversion, construction, and operation of the appropriation works are adequate. §85-2-311(1)(c), MCA (See Finding of Fact No. 18)

Therefore, Application for Beneficial Water Use Permit No. 41K 30022398 by James L. Hadley is **DENIED**.

NOTICE

This final order may be appealed by a party in accordance with the Montana Administrative Procedure Act (Title 2, Chapter 4, Mont. Code Ann.) by filing a petition in the appropriate court within 30 days after service of the order.

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcript prepared as part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements for preparation of the written transcript. If no request is made, the Department will transmit only a copy of the audio recording of the oral proceedings to the district court.

Dated this 8th day of August, 2008.

/Original signed by David A Vogler/
David A. Vogler, Hearing Examiner
Water Resources Division
Department of Natural Resources
and Conservation
PO Box 201601
Helena, Montana 59620-1601

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the PROPOSAL FOR DECISION was served upon all parties listed below on this 8th day of August, 2008, by first-class United States mail.

JAMES L HADLEY
381 8TH LN NE
FAIRFIELD MT 59436

MARC E LEE
13701 BANNER RD SE
OLALLA, WA 98359

LARRY D & SANG H BEERMAN
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Cc:
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HELENA MT 59620-1601
(VIA HAND-DELIVERY)

/Original signed by Cindy Forgey/
Cindy Forgey
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**BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA**

**IN THE MATTER OF APPLICATION FOR
BENEFICIAL WATER USE PERMIT NO.
41K 30022398 BY JAMES L HADLEY**

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PROPOSAL FOR DECISION

Pursuant to the Montana Water Use Act (Title 85, chapter 2, part 3, Montana Code Annotated (MCA)), the contested case provisions of the Montana Administrative Procedure Act (MAPA) (Title 2, chapter 4, part 6), and the administrative procedural rules for contested case hearings (Admin. R. M. 36.12.201, *et seq.*), and after notice required by § 85-2-307, MCA, a contested case hearing was held on July 25, 2007, in Choteau, Montana, before the undersigned Hearing Examiner for the Montana Department of Natural Resources and Conservation (Department or DNRC) in the above-referenced matter. The purpose of the hearing was to determine whether a beneficial water use permit should be issued to Applicant James L Hadley (Applicant), for the above Application under the criteria set forth in § 85-2-311, MCA.

APPEARANCES

Applicant appeared at the hearing and testified on his own behalf. The following witnesses were called to testify by the Applicant: Bob Hardin, Manager, Greenfield Irrigation District (GID); Alan Rollo, Coordinator, Sun River Watershed Group; Dave Yerk, MT Fish, Wildlife and Parks (MT FWP); and Andy Brummond, MT FWP.

Objectors Marc E Lee and Larry D Beerman (collectively Objectors) appeared at the hearing and testified on their own behalf. Objector Sang H Beerman did not appear. The following witnesses were called to testify by Objector Lee: Rick Leighland; Todd Lambert; George Liknes, Region 4 Fisheries Director, MT FWP; Ray White; and Dale Evans.

EXHIBITS

Applicant offered, and I accepted and admitted into evidence, to the extent noted below, the following exhibits:

Exhibit A1 consists of the following labeled photos of Spring Coulee Creek, taken by the Applicant. The photos are not dated. :

1. GID headgate and weir and J-Lake showing zero discharge

2. Proposed land to be irrigated – pump site looking south
3. Proposed land to be irrigated – pump site looking SW
4. Approximate upper end of reservoir – looking upstream
5. North tributary which will flow into north side of reservoir
6. Dam location
7. Flow at dam location looking upstream, zero GID discharge

Exhibit A2 is an Ohio State University Extension fact sheet entitled 'Understanding Pond Stratification', authored by William E. Lynch Jr., Gary L. Connor Jr., and Eric R. Norland

Exhibit A3 is a publication from the internet site 'Water on the Web'. The publication is entitled 'Temperature, Why Is It Important?'

Exhibit A4 is a 3-page article from the Missouri Department of Conservation Aquaguide entitled 'Pond Turnover', dated October, 2004

Exhibit A5 is an article from the Carp Anglers Group entitled 'Still Water Stratification'

Exhibit A6 is a graph showing the Hadley reservoir outlet estimated outflow versus reservoir elevation provided by MT FWP

Exhibit A7 is a graph showing pond retention time versus flow rate prepared by MT FWP

Exhibit A8 is a type written response to MT FWP questions raised in their objection to the Application (which objection was subsequently withdrawn prior to hearing)

Exhibit A9 is correspondence to Jim Hadley from the MT FWP dated March 16, 2007

Exhibit A10 is a Memorandum from Marc Lee to MT FWP dated April 9, 2007 concerning MT FWP's objection to the Application

Exhibit A11 is MT FWP's reply to Objector Lee's Memorandum

Objector offered and I admitted into evidence, to the extent noted below, the following exhibits:

Exhibit O1 is a copy of the Application, including MT FWP objections and response, dam and impoundment specifications, DNRC hazard classification and an Army Corps of Engineers report

Exhibit O2 is an Objection to Application Form 611 submitted by Objector Lee and associated follow-up correspondence

Exhibit O3 consists of copies of §§ 85-2-308, -311 and -343, MCA (2005)

Exhibit O4 consists of 12 photographs of the Spring Coulee Creek riparian restoration project, erosion control and evolving fishery taken by Mark Lee ranging in date from 1997 to 2006

Exhibit O5 consists of MT FWP electro-fishing reports of Spring Coulee Creek for 1998 and 1999

Exhibit O6 consists of a map of the area, and a graphic representations of Spring Coulee Creek flow, including projected filling times of the proposed pond provided by PBS & J. It also includes a technical memorandum from Dan Hoffman, PBS & J Hydrologist concerning Spring Coulee Creek reservoir discharge and volume calculations

Exhibit O7 consists of excerpts from DNRC dam specifications guidebook entitled 'Small Earthen Dam Construction'

Exhibit O8 consists of 2002 temperature data from Spring Coulee Creek mid to lower reach on Objector Lee's property. It is not clear who gathered this data or prepared the document.

Exhibit O9 consists of 2002 J-Wasteway flow data. It is not clear how this data was gathered or who prepared it.

Exhibit O10 consists of sample flow graphs from J-Wasteway for 1989 and 1991, and Spring Coulee Creek for 2003, and sediment data for 2003. It is not clear how this data was gathered or who prepared it.

Exhibit O11 consists of scientific literature references and documents including:

- a) Wehrly, et al. 'Field Based Estimates of Thermal Tolerance Limits for Trout: Incorporating Exposure Time and Temperature Fluctuation'
- b) Sullivan, et al. 'An Analysis of the Effects of Temperature on Salmonids of the Pacific Northwest with Implications for Selecting Temperature Criteria'
- c) Schrouder, et al. 'Managing Michigan Ponds for Sport Fishing'
- d) McCullough, et al. 'A Review and Synthesis of effects of Alterations to the Water Temperature Regime on Freshwater Life Stages of Salmonids, with Special Reference to Chinook Salmon'
- e) LeBeau, et al. 'Montana Ponds Guidebook, pp. 4, 5 & 9'

Exhibit O12 is a letter to Applicant from Objector Lee, dated May 3, 2007

Exhibit O13 is an undated letter from Cameron Rindal to whom it may concern discussing his family fishing on Spring Coulee Creek

Exhibit O14 is an article from the *Great Falls Tribune*, dated July 7, 2007, regarding fisheries closure related to temperature conditions

Exhibit O15 consists of water temperatures recordings from Spring Coulee Creek, for July 2-9, 2007 prepared by Objector Lee.

PRELIMINARY MATTERS

At the conclusion of the hearing, the parties were notified that the record was formally closed. However, due to a technological problem with the recording device for the July 25, 2007 portion of the hearing, DNRC was unable to create a verbatim record of the oral proceedings. The parties were subsequently notified that a re-hearing proceeding could be held if the parties wished to have a verbatim record. Applicant Hadley and Objector Beerman waived having a re-hearing. Objector Lee requested that in lieu of conducting another formal hearing on the record, that the record be re-opened to allow the parties to submit post-hearing summaries of their positions, based upon the testimony and evidence presented during the hearing. The record was re-opened for those limited purposes until September 28, 2007, at which time the record was closed.

Additionally, due to the press of business, a witness called to testify by Applicant, Andy Brummond, MT FWP, was unable to present his oral testimony at the hearing on July 25, 2007. Therefore, the hearing was continued until July 26, 2007, so that Mr. Brummond could testify telephonically. Applicant and Objectors were present at the telephonic hearing. Mr. Brummond's testimony was properly recorded. Objector Sang Beerman did not appear at the hearing and is therefore in default and dismissed. (Adm.R.M.36-12-208)

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, makes the following:

FINDINGS OF FACT

General

1. Application for Beneficial Water Use Permit 41K 30022398 in the name of and signed by James L. Hadley was filed with the Department on May 26, 2006. (Department file)
2. The Environmental Assessment (EA) prepared by the Department for this Application and dated November 29, 2006, was reviewed and is included in the record of this proceeding. (Department file)

3. A public notice describing facts pertinent to this Application was published in the *Choteau Acantha*, a newspaper of general circulation, on December 20, 2006, and was mailed to persons listed in the Department file. (Department file)

4. In the Application and as noticed, the Applicant seeks to appropriate up to 92.9 acre-feet of water per year from Spring Coulee Creek. The water is proposed to be diverted by a dam into a 62.4 acre-foot on-stream reservoir located in the E½ NW¼SE¼ of Section 13, Township 22 North, Range 2 West, Teton County, Montana. The proposed period of diversion is January 1 to December 31 inclusive. The proposed uses include: (1) Irrigation at 336.6 gpm from a secondary point of diversion (pump) up to 48.0 acre-feet and a period of use from April 15 to October 15 inclusive, and (2) livestock drinking directly from the reservoir up to 44.9 acre-feet (including 43.2 acre-feet of evaporation), with a period of use from January 1 to December 31 inclusive. The proposed place of irrigation use is 20 acres in the S½NE¼SW¼, and the place of stock use is the NW¼SE¼ and the NE¼SW¼, all in Section 13, Township 22 North, Range 2 West, Teton County, Montana. (Department file).

Upper Missouri River Basin Closure Issues

5. The proposed reservoir is located in the Muddy Creek drainage, which is within the upper Missouri River basin closure area. The proposed reservoir is designed to help control erosion and to appropriate water for irrigation and livestock use. (Department file, testimony of Applicant).

6. By taking water out of Spring Coulee Creek and storing it in a reservoir, which water will be used for stock water and irrigation, Applicant will be using water that is non-recoverable to GID because it is on the lower end of the project and flows outside the project boundaries. The diversion and usage will occur during the summer when high flows caused by GID return flows cause erosion problems. Although Spring Coulee Creek is located inside the boundaries of the GID operation the proposed reservoir is not part of GID. GID has been involved in the plan for the usage of the proposed reservoir to help slow surges and benefit erosion control. This plan will include the use of check boards which are a design of the outlet structure. When a known surge is anticipated, the reservoir level can be slowly lowered and some of the surge can be held by the reservoir as it fills. (Department file, testimony of Applicant, Bob Hardin, and Alan Rollo). Objector Lee presented testimony to support that he does not believe there is any evidence to support that the proposed use will help control erosion. (Testimony of Objector Lee and George Liknes).

7. I find the Applicant has provided sufficient evidence to show that the proposed project falls under an exception to the upper Missouri River basin, in that the proposed reservoir will help control erosion.

Physical Availability

8. Applicant provided flow data for the measuring sites at Upper, Middle, and Lower Spring Coulee Creek, from May through September of 1998 and 2002. The flows were recorded at aquarod stations. The data shows the flows ranging from 24.9 cfs – 51.8 cfs in 1998 (May 14 – September 25) and 26.2 cfs – 34.8 cfs in 2002 (May 13 – September 20). Applicant also provided monthly 2003 flow averages for Upper, Middle and Lower Spring Coulee Creek for June and July of 2003. For the Upper Spring Coulee Creek measuring site, the 2003 data shows 49.9 cfs in June, 18.3 cfs in July; Middle Spring Coulee Creek site shows 52.8 cfs in June, 31.6 cfs in July; and Lower Spring Coulee Creek site shows 52.1 cfs in June, 34.3 cfs in July. The proposed reservoir is located just above the Upper Spring Coulee Creek measuring site. Applicant also provided the number of acre-feet that passed the Upper Spring Coulee site from May to September using averages for 1998, 2002 and 2003. On average, 9446 acre-feet passed the site. The above measurements were taken by Alan Rollo who is the Sun River Water Shed Coordinator. (Testimony of Applicant and Alan Rollo, Department file).

9. This Application has a period of diversion stated as January 1 to December 31. The Applicant failed to provide any information that supports physical availability outside of May through September.

10. The Applicant did not provide any measurement information from a site above the proposed reservoir or at the proposed point of diversion. All data is from measuring stations below the proposed reservoir.

11. The Applicant did not provide adequate information to show how he calculated the acre-feet data provided in the application.

12. Objector Lee is concerned that Applicant's measurements were not taken at the point of diversion. He also argues that average flows are not meaningful in a stream which fluctuates from 0 to over 200 cfs in the course of a day or days. He provided a photo that shows low flows and provided flow data from J-wasteway above the proposed reservoir site that shows fluctuating flows. The data is dated 1989, 1991, 2002 and 2003. It is not clear who collected the data. The flows in 1989 fluctuated from a low of 0 cfs to a high of 190 cfs in mid July. In 1991 the flow was 0 cfs until May 15 and peaked at a high of 185 cfs towards the end of June. In

2002 flows were 0 until May 13 and peaked at a high of 188 on June 10 and in 2003 flows were 0 cfs until May 10 and peaked at about 99 cfs in mid June. (Testimony of Objector Lee, Department file).

13. I find the Applicant has failed to provide sufficient data to show that water is physically available in the amount requested for the period requested. (Department file, testimony of Applicant and Alan Rollo).

Legal Availability

14. The Applicant has calculated the flow rate needed for the irrigation purpose based upon a secondary pump diversion out of the proposed reservoir. The diesel pump is one that the Applicant already owns. It is not clear if the pump has been used by the Applicant in the past but it is rated for 336 gpm. The Applicant further calculated the flow needed for his stock at .0023 cfs, .75 cfs for irrigation, and .06 cfs for evaporation, for a total of .8123 cfs (364.56 gpm) requested on the Application. The Applicant included water right numbers of those water rights below his proposed diversion on Spring Coulee Creek to its confluence with Muddy Creek and stated the total demand including his new requested Application would be about 6.7138 cfs. The total demand amount included the estimated water use required for the stock water rights on Spring Coulee Creek below the Applicant's proposed diversion, a 105 gpm right for irrigation, another 1745.8 gpm (3.89 cfs) right for irrigation and a 797 gpm right for a fishery. Applicant further stated the demand amount would be easily met by flows as recorded by the aquarod stations. (See Finding of Fact No. 8).

15. Spring Coulee Creek is in the Muddy Creek basin which is a tributary to the Sun River. The proposed reservoir is approximately 6 miles from the confluence of Spring Coulee Creek and Muddy Creek. The Applicant failed to identify any rights below Spring Coulee Creek and failed to provide a comparison of physical availability of water and the legal demands with respect to these rights. I find the Applicant failed to identify the full existing legal demand on the source of supply.

Adverse Effect

16. Applicant's plan includes using two 48 inch spill openings and the 15 inch outlet with headgate in the bottom of the proposed dam to mitigate any possible adverse affects to downstream users. The Applicant proposes to measure the slowing of surges using aquarod flow installations that exist below the proposed dam. The Applicant also proposes to monitor flows in Muddy Creek at the power gauge USGS gauging site, to ensure the flows do not fall

below actual demand and coordination between all water users in the area. The Applicant testified that the only time when flows are low enough that this proposed water right could cause an impact to others is prior to GID irrigation turn-on, which is stated as May or early June and without careful coordination with all upper water right users, the U.S. Fish and Wildlife Service's Muddy Creek water right for fish and wildlife use of Benton Lake could be impacted. The continued teamwork between all upper water right holders is especially critical during April and May when Muddy Creek flows are the lowest. The Applicant did not provide an analysis of flow prior to May or after September. The Applicant also failed to provide a specific plan as to how to address the coordination of water users or impacts to the U.S. FWS water rights. (Testimony of Applicant).

17. The Applicant failed to provide any plan to demonstrate that the Applicant's use of water will be controlled to prevent adverse affect to other water rights downstream of Muddy Creek.

Adequacy of Appropriation Works

18. Applicant designed the proposed reservoir using a design from the United States Department of Agriculture's (USDA) website and stated the design was approved in writing by the Army Corp of Engineers. There is no evidence in the file that indicates the design was approved by the Army Corp of Engineers, or that a licensed design engineer was involved with the planning or design of the proposed dam and outlet structure. According to the Applicant, GID will do all dam construction, but there is no evidence to support that a licensed contractor will complete or oversee the construction. Information in the file indicated that DNRC Engineer Marvin Cross reviewed the dam design and stated that it is a standard design and appears adequate but thought that more information regarding the plan would have been helpful. The Applicant has not proven that the appropriation works is adequate. (Department file, Testimony of Applicant and Bob Hardin)

Beneficial Use

19. The Applicant proposes the use of stored water to irrigate 20 acres of forage, grass and legumes, as well as to provide water for 100 head of cattle.

20. The Applicant used DNRC standards to evaluate the amount of water he will be using and is requesting 48.00 acre-feet for irrigation and 44.90 acre-feet (including evaporation) for stock water use. The Applicant used the publication titled 'Estimation of Evaporation from Shallow Ponds and Impoundments in Montana' authored by Donald F. Potts to evaluate the

amount of evaporation. The volumes of water requested are the amount necessary for the proposed beneficial uses. (Department file)

21. Objectors Lee and Beerman questioned the beneficial use of a storage reservoir this large for irrigation and stock water use. They stated that if there is already water available in the creek as stated in the Application, then there is no need for a storage reservoir. Mr. Beerman testified that the soil under the proposed irrigation area is not suitable to irrigation. (Testimony of the Applicant has proven the flow rate and volume are the amounts of water needed to sustain the proposed beneficial uses)

Possessory Interest

22. Applicant is the owner of the property which has been designated in the Application as the place of use. (Department file)

Water Quality Issues

23. One objection relative to water quality was filed against this Application. No objections relative to water classification, or to the ability of a discharge permit holder to satisfy effluent limitations of his permit were filed against this Application.

24. Objector Lee presented testimony to support that the proposed reservoir would increase temperatures of the Spring Coulee Creek downstream, which is dangerous and harmful to trout. (Testimony of Objector Lee and Dr. Ray White)

25. In a settlement reached with MT FWP, Applicant agreed to change the outlet works for the dam and reservoir, by putting in an outlet at the bottom of the reservoir where water temperatures are cooler. This would take cooler water from the bottom of the reservoir. Andy Brummond, MT FWP, testified there is still a potential for some warming of the water and that warming could cause thermal stress to fish downstream. Dave Yerk, MT FWP, testified that the temperature problem was mitigated by changes made in the outlet structure and that these changes should minimize risks of temperature affects to fish downstream but that he had no predictions on what temperatures might be. George Liknes, MT FWP Regional Fisheries Manager, Region 4, testified that he does not believe the change in the outlet structure is adequate to address the warming problem. (Testimony of Applicant, Andy Brummond, Dave Yerk and George Liknes)

26. The Applicant has shown that the proposed storage reservoir would not cause increased water temperature in the stream below. The change in outlet design will bring cooler water from

the bottom of the proposed reservoir into the creek below. I find the Applicant has adequately shown that the water quality of a prior appropriator would not be adversely affected.

Based on the foregoing Findings of Fact and the record in this matter, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. The Department has jurisdiction to issue a provisional permit for the beneficial use of water if the applicant proves the criteria in § 85-2-311, MCA, by a preponderance of the evidence. § 85-2-311(1), MCA.
2. A permit shall be issued if there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate; water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, and in the amount requested, based on an analysis of the evidence on physical water availability and the existing legal demands, including but not limited to a comparison of the physical water supply at the proposed point of diversion with the existing legal demands on the supply of water; the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state reservation will not be adversely affected based on a consideration of an applicant's plan for the exercise of the permit that demonstrates that the applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied; the proposed means of diversion, construction, and operation of the appropriation works are adequate; the proposed use of water is a beneficial use; the applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use; and, if raised in a valid objection, the water quality of a prior appropriator will not be adversely affected, the proposed use will be substantially in accordance with the classification of water, and the ability of a discharge permit holder to satisfy effluent limitations of a permit will not be adversely affected. § 85-2-311(1) (a)-(h), MCA.
3. A public notice containing the facts pertinent to the permit application was published once in a newspaper of general circulation in the area of the source and mailed to certain individuals and entities. § 85-2-307, MCA. (See Finding of Fact No. 3.)
4. DNRC cannot process or grant an application for a permit to appropriate water within the upper Missouri River basin until final decrees have been issued in accordance with Title 85, chapter 2, part 2, MCA, for all of the subbasins of the upper Missouri River basin. § 85-2-343(1), MCA. The "Upper Missouri River Basin" consists of the drainage area of the Missouri

River and its tributaries above Morony Dam. Section 85-2-342(3), MCA. The basin closure act provides an exception that allows an application for a permit to use water from the Muddy Creek drainage, which drains to the Sun River, if the proposed use of water will help control erosion in the Muddy Creek drainage. Section 85-2-343(2)(e). The basin closure act also provides an exception that allows an application for a permit to appropriate water for stock use. Section 85-2-343(2)(c). The Application falls under the exceptions to the upper Missouri River basin found in § 85-2-343(2)(c) and (e), MCA. (See Findings of Fact Nos. 5 -7.)

5. The Applicant has not proven that water is physically available at the proposed point of diversion in the amount Applicant seeks to appropriate. § 85-2-311(1)(a)(i), MCA. (See Finding of Fact Nos. 8 -13.)

6. The Applicant has not proven that water can reasonably be considered legally available during the period which the Applicant seeks to appropriate in the amount requested. § 85-2-311(1)(a)(ii), MCA. To comply with § 85-2-311(1)(a)(ii), MCA, an applicant must prove that, at least in some years, sufficient unappropriated water will be physically available at the point of diversion to supply the amount requested throughout the period of appropriation, and that at least in some years, no legitimate calls for water will be made on him by a senior appropriator. In the Matter of Beneficial Water Use Permit No. 76N-30010429 by Thompson River Lumber Company (December 2006); In the Matter of Application for Beneficial Water Use Permit No. 81705-g76F by Hanson (1992) (See Finding of Fact Nos. 14 and 15.)

7. The Applicant has not proven that the water rights of prior appropriators under existing water rights, certificates, permits, or state reservations will not be adversely affected. § 85-2-311(1)(b), MCA. (See Finding of Fact Nos. 16-17.)

8. The Applicant has not proven that the proposed means of diversion, construction, and operation of the appropriation works are adequate. § 85-2-311(1)(c), MCA. (See Finding of Fact No. 18.)

9. Stock water and irrigation are recognized as beneficial uses of water under § 85-2-102(4) MCA. The Applicant has proven that the flow rate and volume are the amounts of water needed to sustain the proposed beneficial uses. § 85-2-311(1)(d), MCA. (See Finding of Fact Nos. 19 -21.)

10. The Applicant has proven he has a possessory interest in the property where water is to be put to beneficial use. § 85-2-311(1)(e), MCA. (See Finding of Fact No. 22.)

11. Valid objections were raised to the issue of adverse affect to the water quality of a prior appropriator. The Applicant has proven that the water quality of a prior appropriator will not be adversely affected. § 85-2-311(1)(f), MCA. (See Finding of Fact Nos. 23 -26.)

12. The Department may issue a permit subject to terms, conditions, restrictions, and limitations it considers necessary to satisfy the criteria for issuance of a beneficial water use permit. § 85-2-312, MCA. Applicant has not met the criteria for issuance of a permit when conditions are applied. (See Conclusions of Law Nos. 6-9, 11.)

WHEREFORE, based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER

Application for Beneficial Water Use Permit No. 41K 30022398 by James L. Hadley is **DENIED**.

NOTICE

Any party adversely affected by this Proposal for Decision may file written exceptions and a supporting brief with the Hearing Examiner. Oral argument on the exceptions may be held, if requested. See § 2-4-621, MCA, and Admin. R. M. 36.12.229. Exceptions and briefs, and requests for oral argument must be filed with the Department by **February 26, 2008**, or postmarked by the same date, and copies mailed by that same date to all parties. No new evidence will be considered in the decision-making process.

This Proposal for Decision may be adopted as the Department's final decision unless timely exceptions are filed. No final decision shall be made until after the expiration of the above time period, and due consideration of *timely* oral argument requests, exceptions, and briefs.

DATED this 6th day of February, 2008.

/Original signed by Jan E Langel/
Jan E. Langel, Hearing Examiner
Water Resources Division
Department of Natural Resources
and Conservation
PO Box 201601
Helena, Montana 59620-1601

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the PROPOSAL FOR DECISION was served upon all parties listed below on this 6th day of February, 2008, by first-class United States mail.

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